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August 1, 2003

Tennessee Regulatory Authority  
Attn: Sharla Dillon  
460 James Robertson Parkway  
Nashville, TN 37238

Re: Complaint of Ben Lomand Communications, Inc. against Citizens  
Communications Company of Tennessee, LLC d/b/a Frontier Communications of  
Tennessee; Docket No. 02-01221

Dear Ms. Dillon:

Enclosed are the original and fourteen (14) copies of Ben Lomand Communications, Inc.'s Second Motion to Compel Responses to Its Discovery Requests. Please return one date stamped copy in the SASE also enclosed.

The parties are discussing this Motion and attempting to resolve most, if not all, discovery issues without the necessity of a status conference.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,



H. LaDon Baltimore  
Attorney for Ben Lomand Communications, Inc.

LDB/chm  
Enclosures

cc: Levoy Knowles  
Guilford F. Thornton, Jr., Esq.  
Richard Gilliam, Esq.

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

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**IN RE:**

**COMPLAINT OF BEN LOMAND  
COMMUNICATIONS, INC.**

**Against**

**CITIZENS COMMUNICATIONS  
COMPANY OF TENNESSEE LLC,  
d/b/a FRONTIER COMMUNICATIONS )  
OF TENNESSEE. )**

**DOCKET NO. 02-01221**

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**BEN LOMAND COMMUNICATIONS, INC.'S  
SECOND  
MOTION TO COMPEL RESPONSES TO ITS DISCOVERY REQUESTS**

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Pursuant to Tennessee Rules of Civil Procedure 37.01 and Tennessee Regulatory Authority Rule 1220-1-2-.11(9), Ben Lomand Communications, Inc. ("Ben Lomand"), by and through its undersigned counsel, hereby requests that the Tennessee Regulatory Authority ("Authority" or "TRA") compel Citizens Communications Company of Tennessee LLC, d/b/a Frontier Communications of Tennessee ("Citizens" or "Frontier") to provide full and complete responses to the enumerated discovery requests which were filed and served on Frontier on February 18, 2003 and July 2, 2003. As set forth in greater detail below, Frontier's objections and responses are legally insufficient to allow Frontier to evade Ben Lomand's discovery requests. According, Ben Lomand requests that the TRA deny Frontier's objections and compel Frontier to respond.

This Motion replaces the first motion because several discovery issues in the first motion have been resolved; however, others have not.

## I. GENERAL RESPONSE

Frontier's specific objections, which pertain to the relevancy of the issue of predatory pricing, contravene Tennessee's liberal discovery rules.<sup>1</sup> See, Harrison v. Greenville Ready Mix, Inc., 220 Tenn. 293, 301-02, 417 S.W.2d 48, 51 (1967).

Tennessee Rules of Civil Procedure 26 governs what is discoverable in Tennessee. This rule is broad and provides that parties may "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved whether it relates to the claim or defense of the party seeking discovery or if the claim or defense of any other party. ..." Tenn. R. Civ. P. 26.02(1).

Ben Lomand's discovery requests are well within the scope of and reasonably calculated to lead to admissible evidence concerning the issues of this matter.

The burden is on Frontier, the party resisting discovery, to clarify and explain its objections and to provide support therefore. See, Roesberg v. Johns Manville, 85 FRD 292 (ED Penn. 1992); Miller v. Panucci, 141 FRD 292, 311 (CD Calif. 1992) (parties

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<sup>1</sup> Frontier's response included "General Objections" that do not relate to any specific discovery request, which objected to discovery requests that they exceed the cost justification filed for the April 11 Tariff, violate attorney-client privilege or work product doctrine, proprietary and confidential absent a protective order, and requests information not required by the applicable rules of the TRA. The TRA should ignore such General Objections because they are not tied to specific discovery requests. See, Duncan v. Duncan, 789 S.W.2d 557, 560 (Tenn. App. 1990).

opposing discovery are required to carry a heavy burden of showing why discovery should be denied).<sup>2</sup>

## **II. RESPONSES TO FRONTIER'S SPECIFIC OBJECTIONS TO FIRST SET OF DISCOVERY REQUESTS**

### **A. Interrogatories**

1. Ben Lomand has no objections to Frontier revealing its witnesses when it files its sworn testimony. However, Ben Lomand reserves the right to request a witness list if there is a modification of the pre-hearing or hearing schedule.

2. Interrogatory 2 seeks the number of access lines in service as of December 31, 2001 and December 31, 2002 in McMinnville and Sparta. It is necessary to obtain such information in order to ascertain the number of access line increases, if any, in order to show the increase in Frontier's business. This request is relevant because an increase in business and elimination of competitors is an essential factor in predatory pricing. Furthermore, an Agreed Protective Order has been signed by the parties, thus mooting the objection of "proprietary information."

3. Interrogatories 3, 4, and 5 are appropriate to proving the allegation of predatory pricing. Frontier objects to Interrogatories 3, 4, and 5 as a General Objection that any information to predatory pricing is not to be furnished. Frontier makes this claim based on the fact that the allegations of undue preference and unjust discrimination were not allowed. However, the allegation of predatory pricing was allowed. Frontier cannot escape addressing

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<sup>2</sup> These references to Federal Rule of Civil Procedure 26 are quoted because, in general, Tennessee Rule of Civil Procedure 26 is identical to Federal Rule of Civil Procedure 26. See, Austin v. City of Memphis, 684 S.W.2d 624, 631 (Tenn. Ct. App. 1984).

this issue by stating the tariff meets the operative cost floor set forth in Tenn. Code Ann. §65-5-208(c) and that Frontier has provided information to the TRA for its April 11 tariff. Ben Lomand and the TRA are entitled to know whether the cost study is accurate, what information Frontier furnished to the TRA, and the information Frontier has in its possession which was used to arrive at such cost study, but which was not furnished to the TRA. Such information is necessary and relevant to prove predatory pricing. Also, predatory pricing does not have to be below cost. Furthermore, Tenn. Code Ann. §65-5-208(c), while permitting price floors, also prohibits such price floors to be part of “predatory pricing, price squeezing, ... or other anti-competitive practice.”

4. Frontier’s objections to Interrogatories 6, 7, 8, 9, 10, 11, 15 and 16 are without merit. Frontier objects that the Interrogatories pertain to the allegations of undue preference and unjust discrimination, and that any information regarding predatory pricing is not to be furnished. The information requested in Interrogatories 6 through 11 & 15 through 16 is relevant and necessary to prove predatory pricing. It is essential to know why certain services have been offered in the McMinnville and Sparta areas and not elsewhere in Tennessee. Again, Ben Lomand reiterates that such information is necessary and relevant to the allegation of predatory pricing. The information requested may prove that there has been predatory pricing by showing that Frontier has targeted the McMinnville and Sparta exchanges for the elimination or discouragement of competitors by setting its tariffs below cost, offering upgraded services in such exchanges, and that Frontier offered such tariffs elsewhere than in those exchanges in Tennessee with the result that such tariffs may have been rejected or led to elimination or discouragement of competition in such exchanges. Also, see the response in paragraph 3 to Frontier’s objection.

5. Ben Lomand wishes to point out that, reflective of its allegation that Frontier may be subsidized by other Citizens' affiliates, in its response Frontier interchangeably uses "Frontier" and "Citizens," with "Citizens" being referenced more than "Frontier."

6. The response to Frontier's objections to Interrogatories 2 through 5 are incorporated as if set forth fully herein.

**B. Data Requests**

1. Frontier/Citizens has stated that, without waiving its objections, it will respond to Data Request 1 and produce all applicable costs studies and internal correspondence. Ben Lomand believes such response has been inadequate.

2. Citizens/Frontier should be compelled to answer Data Requests 7 through 13. Such information is necessary to determine the issue of predatory pricing. Ben Lomand restates its responses to Frontier's objections to Interrogatories 2 through 16 which are incorporated as if fully set forth herein.

**C. Request for Admissions**

1. Ben Lomand recognizes that Frontier/Citizens objected to Request for Admissions 1 through 5, but, without waiving its objections, denied all such request for admissions.

**III. RESPONSES TO FRONTIER'S SPECIFIC OBJECTIONS  
TO SECOND SET OF DISCOVERY REQUEST.**

Ben Lomand requested a functioning electronic copy of the analysis populated with all inputs and assumptions used by Citizens/Frontier that will permit Ben Lomand to duplicate the results. Ben Lomand also requested that documents and copies include "tapes, disks, and other means of electronically maintained information". Frontier has not furnished such

requested electronic information. As discussed below, Ben Lomand believes such information can be furnished under the proper agreements and circumstances.

1. Citizens was asked regarding its Exhibit I to indicate the amount of revenue from business customers. Citizens objected to this request on the grounds that this is information it cannot give to a competitor. Ben Lomand's response is that such information is necessary for Ben Lomand to prove its case and that the furnishing of such information is a logistical problem only. One solution for this information to be released only to Ben Lomand's Attorney and Expert witness and not to the Officers, Directors and Employees of Ben Lomand.

2. Data Requests numbers 2 and 3 asked for the amounts of uncollectibles associated with business revenue. Citizens objected on the grounds that it does not track such information during the ordinary course of business. Such information is necessary to prove predatory pricing. Citizens should be able to furnish and track the amount of its uncollected business revenue.

3. Data Request 15 requests a functioning electronic copy of the cost model or models used to develop certain values. Citizens responded that such cost model is licensed. Citizens claims that a working copy is not available under such licensing agreement. A functioning electronic copy of all models is necessary for Ben Lomand to prepare its case to prove predatory pricing. Ben Lomand contends that Citizens claims are unfounded. There is a Protective Order issued in this case. Furthermore, there is precedent; Ben Lomand's expert has received such cost models in other matters. Some of the solutions to this are to provide such a cost model to the expert without furnishing it to the Officers, Directors and Employees of Ben Lomand. Also, a computer with such model can be loaned to expert witness as in other matters,

to work such models. Ben Lomand contends that this is a logistical problem that can be addressed.

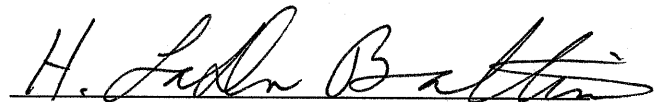
4. Data Request 19 also requests a functioning electronic copy of all models. As in Data Request 15 Citizens/Frontier objected. The response to Frontier objection to Data Request 15 is incorporated as if set forth fully herein.

5. Data Request 20 requests a description of the term "termination charges" and supporting work papers and documentation. Citizens did not furnish such work papers and documentation and refers to Docket 00-00702 for the definition of the "termination language". Citizens stated that their language is based on the "termination language" in such Docket. Citizens such state what deviation and modifications, if any, from such termination language is incorporated.

#### IV. CONCLUSION

For the foregoing reasons, the Authority should grant Ben Lomand's Motion to Compel and direct Frontier to respond completely and fully to Ben Lomand's discovery requests.

Respectfully submitted,



H. LaDon Baltimore, BPR #003836

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*Counsel to Ben Lomand Communications, Inc.*




**Certificate of Service**

The undersigned hereby certifies that on this the 1<sup>st</sup> day of <sup>August</sup>~~February~~ 2003, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

Guilford F. Thornton, Jr., Esq.  
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H. LaDon Baltimore